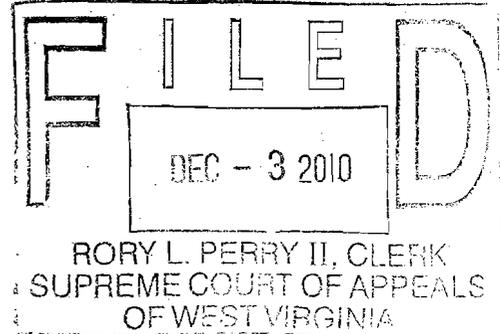


**BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS
at
CHARLESTON, WEST VIRGINIA**

No. 35711



**DARYL'S CARS INC.,
Plaintiff,**

v.

**JERRY L. BUNNER,
Defendant.**

**OPENING BRIEF
ON BEHALF OF
JEROLD L. BUNNER**

On Appeal from the
Circuit Court of Wood County, West Virginia
The Honorable Robert A. Waters, presiding
Wood County Case #04-C-614

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EXHIBITS TO OPENING BRIEF

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<i>Checks for Comparison of J. L. Bunner</i>	<i>Defendant's Trial Exhibit 4</i>
<i>Report of Harold Rodin</i>	<i>Defendant's Trial Exhibit 6</i>
<i>Letter to Sue O'Dell of 3/5/10 regarding Transcript</i>	<i>Exhibit A</i>
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DARYL'S CARS INC.
A West Virginia Corporation,
Plaintiff,

v.

04-C-614

JERRY BUNNER,
Defendant.

OPENING BRIEF
ON BEHALF OF
JEROLD L. BUNNER

Now comes the Defendant-below and the Appellant herein, JEROLD L. BUNNER (hereafter "Petitioner"), by and through his counsel, MICHELE RUSEN and pursuant to Rule 10 of the Rules of Appellate Procedure for West Virginia hereby files the within "*Opening Brief*" seeking reversal of the verdict rendered against him in the Wood County Circuit Court, the Honorable Robert A. Waters presiding.

Nearly five years after the presentation of evidence at a nonjury trial conducted in this matter, the Wood County Circuit Court granted judgment against JEROLD L. BUNNER,¹ holding a contract with the Plaintiff had been breached when the Appellant refused to pay for ten used cars acquired by Kustom Used Kars and Steve Cain in January, 2001. These ten cars were offered for sale on a used car lot which was operated solely by Steve Cain, now deceased.

The contract and agreement between the Plaintiff and Kustom Used Cars with JEROLD L. BUNNER as a signatory thereto was supposedly contained within a written contract dated January 3, 2001 listing the ten cars to be purchased. (*Exhibit 1 hereto.*) However, JEROLD L. BUNNER adamantly denied signing this contract, a contention supported by the testimony of a "well known handwriting expert", Harold Rodin who concluded that the signature of "J. Bunner" on the January 3, 2001 agreement was not

¹ The Plaintiff filed suit against "Jerry L. Bunner." Counsel herein has used Mr. Bunner's legal name "Jerold L. Bunner."

that of JEROLD L. BUNNER. The court-below ignored this testimony and relied instead upon the testimony of JEROLD L. BUNNER's recently divorced ex-wife to rule against the Appellant in this matter.

Compounding the difficulties of appellate review of a case concluded over five years ago, counsel was unable to obtain a transcript of the proceedings held before Judge Waters on March 29, 2005. Further, a transcript will never be obtained as two different court reporters have been unable to transcribe the tape in this matter. The original Court reporter who was present for and who reported these proceedings is no longer able to transcribe the record.² Further, the court reporter employed by the court that regularly reports in Judge Waters' court as well as another court reporter were unable to decipher the tape recording left by the substitute court reporter. Hence, five years after trying this matter in the court-below, counsel is left in the position of attempting to reconstruct and piece together the testimony and evidence adduced by referring to the exhibits, her notes, and the Court's ruling. For this reason, counsel has filed with the Circuit Clerk depositions of Daryl Lawrence, JEROLD L. BUNNER and Jason Bunner previously taken in this case.³ It should also be noted that exhibits believed to be admitted into evidence are not in the record, namely, Defendant's Trial Exhibits 5, 6 and 9.

JEROLD L. BUNNER appeals the judgment against him in the amount of \$25,100.00 plus pre-judgment and post-judgment interest granted by the Circuit Court of Wood County, West Virginia.

I. Nature of the Proceedings Below

This action involves the alleged breach of an alleged agreement for the sale of ten used cars by Daryl's Cars, Inc. to Kustom Used Kars in January, 2001. This lawsuit was filed by Daryl Lawrence, principal stockholder of Daryl's Cars Inc. on or about September 16, 2004 in Wood County Circuit Court. (*Complaint.*)

² Court reporter Debbie Stepp (a steno-mask reporter) reported this matter when she filled in for the court reporter employed by Judge Waters (Lynde Baker). Debbie Stepp was later involved in an automobile accident and is no longer working as a court reporter. Ms. Baker could not transcribe the tape recordings made of the proceedings by Ms. Stepp because of the poor quality of the tape; a copy provided to counsel for the Plaintiff is also unintelligible to counsel for the Defendant. Another court reporter also attempted to do so without success. (*See Exhibits A and B hereto.*)

³ The deposition of Jason Bunner was taken by agreement following the bench trial inasmuch as Jason Bunner was out of state and unavailable to testify on the day the bench trial was held. Jason Bunner has since died. Trial counsel for the Plaintiff, William E. Kiger has also since passed away.

In the *Complaint*, Mr. Lawrence alleged that JEROLD L. BUNNER “had entered into an Agreement with the Plaintiff whereby the Defendant received from the Plaintiff ten (10) used vehicles and agreed to pay to the Plaintiff the sum of Twenty Six Thousand Nine Hundred Dollars, said sum to be paid when the vehicles had been sold by the Defendant and in ‘reasonable time.’” (*Complaint at ¶3.*) The *Complaint* cited an agreement allegedly signed by “J. Bunner” on January 3, 2001. (*Complaint at ¶4; Exhibit A hereto.*) The Plaintiff sought judgment against JEROLD L. BUNNER in the amount of \$25,100.00. (*Complaint at ¶6.*)

A non-jury trial was held before the Honorable Robert A. Waters on March 29, 2005. In the absence of Judge Waters’ court reporter, Lynde Baker, court-reporter Debbie Stepp substituted and reported these proceedings. Following the testimony of twelve or thirteen witnesses, the admission of a number of exhibits and the submission of the deposition of Jason Bunner taken on April 14, 2005, this matter was taken under advisement by the court-below.

After over a year passed without a ruling, a status conference was held on July 31, 2006. The parties were at that time promised that a ruling would be shortly forthcoming. That ruling was not issued, however, until November 16, 2009, nearly five years after the evidentiary hearing was held. JEROLD L. BUNNER now appeals the ruling of the circuit court granting judgment against him.

II. Statement of Facts.

DARYL LAWRENCE is the sole stockholder of DARYL’S USED CARS, INC., a business selling used cars in Parkersburg, West Virginia since 1971. (*Deposition of Daryl Lawrence, 3.*)⁴ DARYL LAWRENCE has known JEROLD L. BUNNER for thirty years and had known him to “dabble” in the buying and selling of cars. (*Id. at 4.*) According to JEROLD L. BUNNER and STEVE ROWLAND, BUNNER had in the past purchased automobiles, refurbished them and then re-sold those vehicles for a profit. However, despite his thirty years of selling cars, DARYL LAWRENCE acknowledged he had never had any business “deals” with JEROLD L. BUNNER other than the one at

4. Since no transcript of the proceedings is available to assist counsel and this Court, deposition transcripts have been filed in the record herein. These include the depositions of Daryl Lawrence; Jerold L. Bunner (both taken in February 2005) and Jason Bunner. The transcript of Jason Bunner was already supposed to have been filed in these proceedings, but upon review of the court file, counsel did not find Jason Bunner's transcript and accordingly, submitted it again. (*See Exhibit C, letter to the Honorable Judge Robert A. Waters.*)

issue in this case. (*Id.*) JEROLD L. BUNNER stated that any cars he purchased from DARYL LAWRENCE were almost always “cash” deals.

DARYL LAWRENCE testified that JEROLD L. BUNNER had called him and asked him about acquiring used cars in December, 2000. According to DARYL LAWRENCE, JEROLD L. BUNNER was going to open a used car lot. His proof of this “deal” was Exhibit 1, a document titled “*Motor Vehicle Purchase Agreement*” which was a pre-printed form used by Daryl’s Cars, Inc. (*Exhibit 1 hereto.*) This agreement noted that the purchaser was “Kustom Used Kars” and had signatures purporting to be those of “Daryl Lawrence”, “J. Bunner” and “Steve Cain.” DARYL LAWRENCE signed Exhibit 1, and “assumed” that “J. Bunner” which appeared in two different places on Exhibit 1 was the Defendant JEROLD L. BUNNER’s signature. (*Deposition of Daryl Lawrence at 5.*) The basis for this assumption was that “when they brought the contract back” to him, DARYL LAWRENCE had told them that he didn’t know Steve Cain and would not accept his signature. (*Id.*) According to DARYL LAWRENCE, “I wanted Jerry’s signature on there. I wouldn’t sell to Steve.” (*Id.*)

DARYL LAWRENCE admitted in his deposition that he did not see JEROLD L. BUNNER sign Exhibit 1 and went on to describe the circumstances surrounding this agreement:

Q: And what did you do with [the agreement] once you wrote it out?

A: I can’t remember if Jerry and Steve came and picked [the agreement] up. I don’t remember if they were both there or not, but I know when Steve brought the thing back in and it was signed by him, I said, “I won’t accept this. I am selling the cars to Jerry Bunner because I know Jerry and I didn’t know you.”

As well as I remember, they come back and both of them come in and brought this, and Jerry took it over and sat down at my desk, and I assume that he signed it there. (*Deposition of Daryl Lawrence at 6.*)

Despite the fact that Steve Cain allegedly signed this agreement *before* JEROLD L. BUNNER did as set forth above, Steve Cain’s signature is nevertheless hanging above the signature of “J. Bunner” which appears right on the dotted line. (*See Exhibit 1 hereto.*) The same is true with regard to the two signatures following the handwritten statement penned in the middle of the contract to the effect that “Jerry Bunner agrees

to pay for cars as sold in reasonable time.” Signed “J Bunner [and then] Steve Cain.” At no time was this anomaly explained.

JEROLD L. BUNNER emphatically denied signing the agreement at issue. (*Deposition of Jerry Bunner, 6.*) In fact, JEROLD L. BUNNER explained that had never seen this agreement until after Steve Cain died on October 27, 2002, almost two years after the date this agreement was signed. According to BUNNER, he found the agreement in a briefcase located in a 1986 Pontiac (one of the ten vehicles sold to Kustom Used Kars) that Steve Cain was keeping at his home at the time of his death.⁵ (*Id.*)

Moreover, JERRY BUNNER’s insistence that he had not signed this agreement was supported by the testimony of Harold Rodin, an experienced handwriting expert. (*See Exhibit 6 hereto, Report of Harold Rodin. See also, Defendant’s Trial Exhibit 1, Curriculum Vitae of Harold Rodin.*) Harold Rodin reached this conclusion after comparing the signatures on Exhibit 1 to over thirty different checks signed at random by JERRY BUNNER. (*See Defendant’s Trial Exhibits 3 and 4 appended hereto.*) While the Plaintiff attempted to undermine this analysis because the checks used for comparison were written after the lawsuit was filed, Harold Rodin concluded it was extremely unlikely that someone could write so many checks without displaying some of the characteristics of the handwriting in the contract if the signatures on the contract were those of JERRY BUNNER. Most notably, Plaintiff’s Exhibit 2, a “pre-litigation” check written by JEROLD L. BUNNER to Daryl’s Cars on August 23, 2002 revealed a signature identical to those found on the “post-litigation” checks examined by Harold Rodin. Nevertheless, the court-below relied instead upon the testimony of BUNNER’s recently divorced ex-wife.⁶

DARYL LAWRENCE did not even know who came to his lot to transport the cars listed on Exhibit 1; however, it was established that the cars were taken to 1700 Pike Street in Parkersburg, West Virginia by “Steve Cain and his friends,” friends that did not

5. After Steve Cain died on October 27, 2002, a 1986 Pontiac, one of the ten vehicles listed in the agreement, was towed from Steve Cain’s residence by JEROLD L. BUNNER at the request of Daryl Lawrence. (*Deposition of Daryl Lawrence at 12; Deposition of JEROLD L. BUNNER at 8.*)

6. BUNNER’s divorce from his ex wife LINDA GARRISON was final in July 2003. She testified that she had seen him sign name in different ways. No written documentation in support of that testimony was offered.

include BUNNER. Further, there was no evidence that JEROLD L. BUNNER had any involvement whatsoever in "Kustom Used Kars" nor did DARYL LAWRENCE offer any documentary proof that JEROLD L. BUNNER was associated with Kustom Used Cars. As JEROLD L. BUNNER explained:

... I had nothing to do with the agreement or the document to buy or sell the cars. I know this fellow. I knew Steve Cain. He is dead now. I knew Steve Cain. He came to me and was trying to get a car lot started and he said, "Do you know anybody that I can get some cars to sell to get a business going."

I thought Daryl and I were friends at the time and I said, "I will hook you up with Daryl and take you over there and you guys can get together and make a decision."

I called Daryl via telephone and I said, "Daryl, I have a guy here that is trying to get started. He is looking for some back row stuff." It's not Daryl's specialty. These things here are not what Daryl usually has. And he would like to see if you got anything. He said, "Send him over and we will see what we can do," but I did that via telephone.

Q: You are saying that you didn't even go there when this document was prepared?

A: I most certainly did not. (*Deposition of JEROLD L. BUNNER at 7*).

Nor long after he signed this agreement, Steve Cain suffered a heart attack in February, 2001. After that, STEVE CAIN's health was not good, so JEROLD L. BUNNER helped STEVE CAIN move these and other cars from 1700 Pike Street to a lot on Route 47 owned by his nephew, Jason Bunner on Route 47. Steve Cain rented this lot from JASON BUNNER for \$500 per month, paid in cash.

(*Deposition of JEROLD L. BUNNER at 9; Deposition of Jason Bunner at 6-7.*)

Initially, STEVE CAIN was active in the business and spent time at the car lot. While Steve Cain paid his rent for a time, eventually the rent went unpaid and Mr. Cain's telephone number was disconnected. (*Deposition of Jason Bunner at 10.*) At that point in time, Jason Bunner called his uncle, who had introduced Jason Bunner to Steve Cain and told JEROLD L. BUNNER that he wanted the cars removed from his lot. (*Id.*) Soon thereafter, the cars were gone. Jason Bunner confirmed that he had observed nothing that led him to believe that his uncle was a partner in this business. (*Id. at 11.*)

Sometime shortly thereafter, JEROLD L. BUNNER called DARYL LAWRENCE to warn his friend. He told DARYL LAWRENCE "I don't know what you and Cain come up with on this, but they are driving your cars and he is not doing anything with them or whatever, and Jason wants them moved off. He has not paid his rent and Jason wants them moved." (*Deposition of JEROLD L. BUNNER at 9.*)

Around the time that STEVE CAIN died, JEROLD L. BUNNER called DARYL LAWRENCE from time to time to ask if LAWRENCE wanted to sell any of the remaining cars when BUNNER thought someone might be interested. (*Deposition of JEROLD L. BUNNER at 14.*) The only vehicle ever paid for was a 1967 truck paid off in August, 2002 via a loan made by JEROLD L. BUNNER to the purchaser, although the title was transferred in May, 2001. (*Defendant's Trial Exhibits 10 and 11.*) By February, 2005, the remaining nine vehicles had been moved from the Kustom Kars car lot on Route 47 to a storage facility belonging to Dwayne Schneider. (*Deposition of JEROLD L. BUNNER at 17.*) The nine cars were taken to the storage facility after BUNNER called DARYL LAWRENCE and asked what should be done with the cars and DARYL LAWRENCE told JEROLD L. BUNNER there was no room for them on his car lot.

From January 3, 2001 until shortly before Mt. Cain's death on October 27, 2002, JEROLD L. BUNNER had no involvement with marketing these vehicles. On one occasion, BUNNER had test-driven a 1989 Mitsubishi automobile he was thinking about buying for his wife, (now ex-wife, Linda Garrison). He had also loaned the purchaser the money to buy the 1967 truck. (*Deposition of JEROLD L. BUNNER at 11.*) Moreover, at no point before he filed suit did DARYL LAWRENCE ever contact JEROLD L. BUNNER to request payment for these vehicles. DARYL LAWRENCE did however, communicate with Dwayne Schneider through his counsel about the cars which were being stored. (*Defendant's Trial Exhibit 12.*)

It is also important to note that the titles to the vehicles in were transferred from DARYL'S USED CARS to KUSTOM USED CARS. (*See Defendant's Trial Exhibit 8.*) Since the vehicles were titled in this manner, BUNNER had no means whatsoever to have the titles to these vehicles transferred to anyone. This was because JEROLD L. BUNNER was not ever in any manner affiliated with KUSTOM USED CARS. However, these critically important facts were totally ignored by the court-below when it belatedly issued its ruling.

Quite obviously, the court-below struggled with ruling in this case, waiting four years and five and one-half months before finally deciding the matter in favor of the Plaintiff. In its ruling in favor of the Plaintiff, the court-below simply adopted the facts recited in a *Memorandum* submitted by the Plaintiff shortly after the hearing in the matter which naturally did not mention these facts.

The Circuit Court determined that the JEROLD L. BUNNER had signed the agreement, completely discounting the opinion of a well-respected and experienced handwriting expert in favor of an ex-wife. The court-below ignored facts and information which directly contradicted that offered by the Plaintiff, most likely because that information had erased from memory by the passage of time.

III. Assignments of Error

The Wood County Circuit Court has deprived JEROLD L. BUNNER of his ability to effectively appeal this matter by delaying its decision for so long that it is now impossible for JEROLD L. BUNNER to obtain a transcript of the proceedings necessary to prosecute this appeal.

The Wood County Circuit Court erred in ruling in favor of the Plaintiff when the Plaintiff failed to establish that JEROLD L. BUNNER signed the agreement in question and since the titles to these vehicles were never transferred and could not be transferred to JEROLD L. BUNNER.

IV. Argument

A. *The delay of the Wood County Circuit Court in ruling upon this matter has deprived JEROLD L. BUNNER of his ability to effectively appeal this matter since it is now impossible for JEROLD L. BUNNER to obtain a transcript of the proceedings necessary to prosecute this appeal.*

It has long been recognized that undue delay in ruling upon civil cases is not acceptable as set forth in the constitution and the judicial canon of ethics. This was discussed at length in *State ex rel. Patterson v. Aldredge*, 173 W.Va. 446, 317 S.E.2d 805 (1984).

Under article III, § 17 of the West Virginia Constitution, which provides that "justice shall be administered without sale, denial or delay," and under Canon 3A(5) of the West Virginia Judicial Code of Ethics (1982 Replacement Vol.), which provides that "A judge should dispose promptly of the business of the court," judges have an affirmative duty to render timely decisions on matters properly submitted within a reasonable time following their submission. Article III, § 17 of the West Virginia Constitution, which guarantees the expeditious disposition of all civil matters, is separate from the right to a speedy trial in criminal cases protected under article III, § 14 of the West Virginia Constitution. Canon 3A(5) of the West Virginia Judicial Code of Ethics, as well as the principle contained within its admonition, is often utilized as a foundation for the imposition of judicial discipline for unreasonable delays in the disposition of court business. See, e.g., *In re Weeks*, 134 Ariz. 521, 524-25, 658 P.2d 174, 177-78 (1983); *In re Heideman*, 387 Mich. 630, 631-32, 198 N.W.2d 291, 291-92 (1972); *In re Anderson*, 312 Minn. 442, 447, 252 N.W.2d 592, 594 (1977); *In the Matter of Kohn*, 568 S.W.2d 255, 260-62 (Mo. 1978); *In re Corning*, 538 S.W.2d 46, 48-50 (Mo. 1976); *In the Matter of MacDowell*, 57 A.D.2d 169, 174, 393 N.Y.S.2d 748, 751 (1977); *Judicial Qualifications Commission v. Cieminski*, 326 N.W.2d 883, 886 (N.D. 1982); *Matter of Cieminski*, 270 N.W.2d 321, 324 (N.D. 1978).

In addition to the constitutional and ethical provisions which compel the prompt disposition of all civil actions, it should be noted that our rules of civil procedure anticipate that judges will act in a timely fashion. In this respect, the fundamental rule of construction governing our rules of civil procedure is that "They shall be construed to secure the just, speedy, and inexpensive determination of every action." W.VA.R.CIV.P. 1 (1982 Replacement Vol.). Finally, we note that several states have enacted constitutional or statutory provisions requiring judicial officers to dispose of court business within certain time frames. See, e.g. IDAHO CONST. art. 5, § 17 (1980) (thirty days); ARIZ.REV.STAT.ANN. § 11-424.02 (1983 Supp.) (sixty days); KY.REV.STAT.ANN. § 454.350 (Bobbs-Merrill 1983 Supp.) (ninety days); TENN. CODE ANN. §20-9-506 (1980) (sixty days).

The effect of unwarranted delay upon a litigant's rights to appeal when that delay directly results in prejudice to a civil litigant as is the case here has not frequently been discussed. While the cases concerning delay in criminal cases are numerous, such is not the case with civil matters. Nonetheless, *Petry v. Stump*, 219 W.Va. 197, 632 S.E.2d 353 (2006) is instructive on this issue. In that case, the Commissioner's delay of five years in issuing an administrative ruling upon a license revocation was "so egregious that it [was determined to rise] to the level of being presumptively prejudicial..." *Petry v. Stump, supra*, 219 W.Va. at 200. The delay in that case, coupled

with the fact that transcripts of the hearing held had been lost along with the evidence submitted during the administrative hearing constituted a denial of due process and prejudice which warranted the dismissal of the revocation proceedings against Mr. Petry. While admittedly no governmental or state action is at issue in this proceeding, nevertheless, the long delay and the loss of a transcript makes a meaningful review of this matter similarly impossible.

Transcripts of testimony and proceedings are necessary components of the judicial process and justice system. Thus, West Virginia Code §51-7-1 empowers and authorizes the circuit courts to "appoint competent court shorthand reporters to take and report . . . the proceedings had and the testimony given in any case, either civil or criminal..." "It shall be the duty of such reporter to take full shorthand notes of the testimony and the proceedings in which his services may be required, and such notes shall be deemed and held to be official and the best authority in any matter in dispute." West Virginia Code §51-7-2. A court reporter is an officer of the court. *State ex rel. Legg v. Boles*, 148 W.Va. 354, 135 S.E.2d 257 (1964).

Again, many of the cases addressing the lack of a transcript as potential error concern criminal matters. The lack of a transcript in criminal cases does not necessarily mandate reversal but can form the basis for a new trial. *State v. Neal*, 172 W.Va. 189, 304 S.E.2d 342 (1983). In that regard, this Court has observed as follows:

Syllabus point 5 of [*State v.*] *Bolling* states in full that: "Under the provisions of W. Va. Code, 51-7-1 and -2, all proceedings in the criminal trial are required to be reported; however, the failure to report all of the proceedings may not in all instances constitute reversible error." [fn6] Nor does the language of *W. Va. Code*, 51-7-1 [1931], and *W. Va. Code*, 51-7-2 [1931], distinguish felonies from misdemeanors concerning the requirement of court reporters. Specifically, *W. Va. Code*, 51-7-1 [1931], empowers circuit courts to appoint court reporters for proceedings "either civil or criminal," and *W. Va. Code*, 51-7-2 [1931], requires court reporters to take notes of "testimony and proceedings" as may be required. We therefore hold that under the provisions of *W. Va. Code*, 51-7-1 [1931], and *W. Va. Code*, 51-7-2 [1931], all proceedings in a criminal trial in circuit court are required to be reported, whether such proceedings relate to felony or misdemeanor charges; however, the failure to report all of the proceedings may not in all instances constitute reversible error. *State v. Neal*, *supra*, 172 W.Va. at 192.

This Court went on to reverse the conviction in this particular matter because it found itself "at a loss to review the petitioner's assertion[s]..."

Our inability to review such assignments of error for lack of a complete record, we conclude, is prejudicial to the petitioner in this case within the meaning of *Bolling*. Nor under the circumstances of this case do we believe that a record can be reconstructed. See Syllabus point 2, *State ex rel. Kisner v. Fox*, 165 W.Va. 123, 126, 267 S.E.2d 451, ____ (1980).

Similarly, in *State v. Chanze*, 211 W.Va. 257, 565 S.E.2d 379 (2002) this court concluded that due to the unavailability of an electronic record of a magistrate court criminal jury trial so that virtually no record was available from which to prepare an appeal, the defendant was entitled to meaningful review through reconstruction of the record, or if reconstruction is impossible, by receiving a new trial. *Syllabus Pt. 2*.

The problem with reconstructing the record is self-evident.

Recollections and notes of trial counsel and of others are apt to be faulty and incomplete. Frequently, issues simply cannot even be seen — let alone assessed — without reading an accurate transcript *Hardy v. United States*, 375 U.S. 277, 280 n. 3 (1964), citing Boskey, "The Right to Counsel in Appellate Proceedings," 45 Minn. L. Rev. 783, 793 (1961). *State ex rel. Kisner v. Fox*, 165 W.Va. 123, 126, 267 S.E.2d 451, ____ (1980).

It is also important to note that in the instant case, the long pre-ruling delay has directly contributed to counsel's inability to obtain a transcript of these proceedings. Some reconstruction of the matters tried herein is possible through deposition transcripts and exhibits. Nevertheless, even though the undersigned counsel tried this matter in March, 2005, existing notes and memory fail and are less than perfect. The use of the *Plaintiff's Memorandum* as the sole basis to glean the facts at issue in this matter is decidedly one-sided and inherently unfair. Accordingly, the passage of so many years coupled with the lack of a transcript create the need for remand and a new trial in this matter.

B. *The Wood County Circuit Court erred in ruling in favor of the Plaintiff when the Plaintiff failed to establish that JEROLD L. BUNNER signed the agreement in question and since the titles to these vehicles were never transferred and could not be transferred to JEROLD L. BUNNER.*

A final order entered by a circuit judge is reviewed by this Court as follows: the findings of fact made by the family court judge are reviewed under

the clearly erroneous standard, and the application of law to the facts is reviewed under an abuse of discretion. Questions of law are reviewed *de novo*. *Carr v. Hancock*, 216 W.Va. 474, 607 S.E.2d 803 (2004).

It is obviously difficult to review the court-below's findings of fact in the absence of a transcript of the testimony. It is important to note, first and foremost, that the Plaintiff failed to establish as a factual matter that there was a binding contract for the sale of the used cars between DARYL's USED CARS, INC. and JEROLD L. BUNNER. At trial DARYL LAWRENCE stated that JEROLD L. BUNNER and STEVE CAIN came to his office with the contract in hand. In his deposition, he couldn't remember if the two were at his office together when the contract was signed. Thus, there was serious doubt that DARYL LAWRENCE could state that JEROLD L. BUNNER signed any agreement, his "assumption" of that fact notwithstanding. In fact, the contradictions of these stories make the Plaintiff's memory and testimony suspect at the best.

JEROLD L. BUNNER maintained from the very beginning of this matter that he had not signed the contract at issue and that he never went to, or was present at DARYL LAWRENCE's office for the purpose of signing or delivering such a contract as the Plaintiff testified at trial. Further, JEROLD L. BUNNER's testimony was supported by Harold Rodin, a handwriting expert with many, many years of experience. Mr. Rodin opined that the signature of "J. Bunner" which appeared on the agreement was not the signature of Jerry L. Bunner and testified in great detail as to why that was so. Indeed, even to the untrained eye, the signatures look very different. Moreover, not a single shred of evidence exists in this record in which JEROLD L. BUNNER signed his name to any check, receipt of any other document by using "J. Bunner."

While Daryl Lawrence argued that he would not have delivered the cars to Steve Cain for sale on consignment absent BUNNER's participation in the deal, this fact was never shared with JEROLD L. BUNNER until this litigation commenced. JEROLD BUNNER's phone call to DARYL LAWRENCE to convey offers to buy cars offered for sale by Kustom Used Kars most certainly contradicts the notion or conclusion that JEROLD L. BUNNER believed he owned the cars and had a right to sell them. Further, when asked to move the

cars from the Route 47 car lot which Jason Bunner rented to Steve Cain, JEROLD L. BUNNER first conferred with STEVE CAIN, a circumstance also inconsistent with someone who owned the cars. (*See, Deposition of Jason Bunner.*)

The fact is that JEROLD L. BUNNER had no reason to think he was owner of these vehicles. The cars at issue were titled not to JEROLD L. BUNNER, JERRY BUNNER or even to J. BUNNER. The cars were transferred to KUSTOM USED KARS. Given that circumstance, BUNNER could not have sold or transferred the cars even if he had a mind to do so. The cars were sold to a business in which JEROLD L. BUNNER had no interest. JEROLD L. BUNNER didn't participate in this business, owned no stock in the business and have no involvement in it. Obviously, had there been any documentation on record with the State of West Virginia or the Department of Motor Vehicles establishing that JEROLD L. BUNNER was connected to or involved in the ownership and operation of Kustom Used Kars in any manner, the Plaintiff would surely have brought it forward. There is no such proof because JEROLD L. BUNNER was not affiliated in any manner with Kustom Used Kars.

In a nutshell, JEROLD L. BUNNER was nothing more than a middleman, or intermediary between DARYL LAWRENCE and Steve Cain. The signature on the Agreement was not placed there by BUNNER; how it got there is unknown. There was no meeting of the minds between JEROLD L. BUNNER and DARYL LAWRENCE as to the sale of these cars because the cars were not sold to JEROLD L. BUNNER. "A meeting of the minds of the parties is a *sine qua non* of all contracts." Syl. Pt. 4, *Sprout v. Board of Education of Harrison County*, 215 W.Va. 341, 599 S.E.2d 764 (2004). In this case, JEROLD L. BUNNER was not even a knowing party to this contract. Certainly he never bargained with DARYL LAWRENCE as to the sale prices of the cars at issue before Steve Cain took possession of them. Indeed, the values of each of the various vehicles are disputed as the testimony made clear. This Court can only speculate that Steve Cain improperly and without authorization added BUNNER's alleged signature to the document after DARYL LAWRENCE insisted that this signature was needed for the deal to go through.

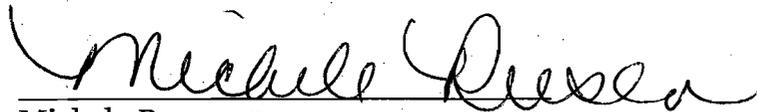
The fact that JEROLD L. BUNNER has purchased, refurbished and sold used cars through the years does not compel a different result. JEROLD L. BUNNER was not involved as a manager, partner, and financier or in any way with Kustom Used Kars. In fact, he could not have sold the cars at issue if he wanted, as he had no authority to transfer title to these cars. Under the doctrine of impracticability, even if JEROLD L. BUNNER had contracted with DARYL LAWRENCE, it would be impossible for him to sell these cars and complete his obligations under this contract. Accordingly, enforcement of this contract is not legally possible. *Waddy v. Riggleman*, 606 S.E.2d 222 (W.Va. 2004).

The factual findings of the court below are not supported by the scanty record which does exist. The court's findings are clearly erroneous. Accordingly, the ruling of the circuit court should be reversed.

V. Conclusion and Prayer

For all of the reasons set forth herein, the Petitioner, JEROLD L. BUNNER respectfully prays that the Court enter an *Order* reversing the ruling of the Wood County Circuit Court granting judgment against him; that this Court set aside the ruling herein; that this matter be remanded to Wood County Circuit Court; and for such further and other relief as this Court may deem appropriate.

JEROLD L. BUNNER
By Counsel,

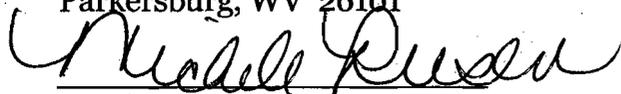


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CERTIFICATE OF SERVICE

This 2nd day of December, 2010, the undersigned certifies that the enclosed "*Opening Brief of Jerold L. Bunner*" in case number 35711 was served upon the following persons, by mailing, first class postage prepaid, a true and accurate copy thereof to:

Virginia A. Conley
610 Market Street, Suite 3
Parkersburg, WV 26101



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EXHIBITS

ON

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